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Supreme Court of the United States

October Term, 1932

No......

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

vs.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

Petition for Writ of Certiorari

To the Honorable The Supreme Court of the United States:

The petition of William H. Edelman, State Treasurer; Harry R. Weston, State Treasurer; The City of Cheyenne, a municipal corporation; and The City of Rock Springs, a municipal corporation, respectfully shows to this Honorable Court:

A

Issues in the Case

1. On the 25th day of November, 1930, the respondent, Boeing Air Transport, Inc., a corporation of the State of Washington, filed in the United States District Court for the District of Wyoming, its Bill of Complaint against your petitioners, residents of the State of Wyoming, in which said Bill is sought relief permanently enjoining and restraining petitioners from collecting a license, or excise, tax of four cents per gallon on all gasoline held and owned by it in the State of Wyoming and used as fuel in propelling its airplanes in the transportation of passengers, express, and United States mail in interstate commerce.

2. The grounds for the relief sought are that the statutes of the State of Wyoming by virtue of which the tax had been collected from respondent are unconstitutional and in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, the commerce clause of the Federal Constitution, and that the tax is on the use of gasoline in interstate commerce, and thus an illegal interference with commerce among the states.

3. It is alleged that, by reason of the severe provisions and penalties of the statutes, irreparable loss and damages would result to respondent unless it should be granted equitable relief.

4. The alleged illegal tax had been paid by respondent, under protest, and the amount thereof is alleged to be in excess of $10,000.00, in the original and supplemental bills.

5. It is alleged that the gasoline of respondent on which the tax had been paid had been purchased by respondent partly within and partly outside the State of Wyoming.

6. The prayer of the Bill is in the usual terms for a permanent injunction, and for, to quote therefrom, "such other and further relief as the equity and justice of the case may require and which the Court may deem meet and just, whether specifically prayed for herein or not" (R. 1 and 44).

7. Petitioners answered, relying upon the legality of the statutes under which the tax had been collected, and asserting that the tax was not an illegal interference with, or regulation of, commerce among the states (R. 13, 17 and 30).

B

Opinion of the Court, and Final Decree

The matter of the issuance of an interlocutory injunction was not pressed, no such injunction was issued, and the action was tried by a single District Judge.

On trial on the merits, the findings of fact (R. 47), conclusions of law (R. 59), and decree (R. 60) of the District Court were in favor of petitioners, the injunction was denied, and the case was ordered dismissed at costs of respondent.

In due time the respondent appealed the case to the United States Circuit Court of Appeals for the Tenth Circuit, which Court, in its opinion, ordered the case remanded with directions to issue the writ enjoining collection of the tax on all

gasoline procured by respondent on purchases completed outside the State of Wyoming and then brought into the State and used in its planes in interstate commerce, but in all other respects affirmed the order of dismissal of the District Court. However, the Senior Circuit Judge was of the opinion that the pleadings and facts in the case were too meager and indefinite to require and sustain a ruling and decree thereon. The opinion of the Circuit Court of Appeals is reported in 61 Fed. (2d) 319, Advance Sheets No. 5, November 28, 1932 (R. 134). Decree was entered on October 20, 1932, remanding the cause to the Trial Court with directions to issue the writ of injunction enjoining petitioners from collecting the tax of four cents per gallon on all gasoline procured by respondent on purchases of gasoline completed outside the State of Wyoming and then brought into said State and used in propelling its airplanes in interstate commerce (R. 144).

In due time petitioners filed in the Circuit Court of Appeals their petition, and supporting brief, for a rehearing, which was denied by the Court on November 25, 1932 (R. 147).

In due time respondent filed in the Circuit Court of Appeals its petition for clarification of decree, which was denied by the Court on November 25, 1932 (R. 150).

C

Statement of Facts

And your petitioners respectfully show that the facts of the matter involved and on which the United States Circuit Court of Appeals for the Tenth Circuit rendered its decree directing the issuance of the writ of injunction against the collection of such tax by petitioners are, in the language of that Court, Page 322, the following:

> "Appellant procures gasoline from both inside and outside the State of Wyoming; after it is purchased part of it is brought to Cheyenne and part to Rock Springs and stored in tanks for use at appellant's direction and subject to any use it wishes to make of it; there is one tank at Rock Springs and two at Cheyenne; the capacity of one of the tanks at Cheyenne is five thousand gallons and the other two thousand gallons; appellant sells some gasoline at Cheyenne and at Rock Springs; it displays a price sign at each place, stating the price of gasoline including the

tax; other planes use both of these fields, and appellant uses gasoline locally at each field in trucks, automobiles, for testing purposes, and washing planes; there is no separate receptacle at either field in which appellant stores the gasoline which it sells to other airships, or buys outside Wyoming; it is all put into the storage tanks; there are gauges on the pumps, and a record was kept each time that gasoline was drawn from the tanks; the amount used locally by appellant, or sold, is in this way kept separately from the amount used by appellant in its interstate flights; it likewise measures the gasoline put into its planes for interstate commerce use. The record does not disclose how much gasoline during the times in question was purchased outside the state. On the facts stated it must have been mingled in the tanks with gasoline purchased within the state. Appellant paid the tax on the gasoline used by it locally and on that sold to others without protested payments on all put in its tanks and used in interstate flights. Obviously it is impossible to ascertain how much gasoline that came from outside of Wyoming was thus used in its planes. Moreover, it does not appear whether gasoline purchased outside of Wyoming was delivered to appellant in Wyoming or outside the State."

In addition, the undisputed testimony was that no excise, or license, tax had been paid on any of such gasoline procured by respondent on purchases outside the State of Wyoming (R. 104).

D

Reason Relied on for the Allowance of the Writ of Certiorari

Your petitioners are advised and so believe, that under the facts and the law of this case the decree of the United States Circuit Court of Appeals for the Tenth Circuit, reversing the decree of the District Court, wherein and to the extent that it remanded said cause to the Trial Court with directions to issue the writ of injunction enjoining petitioners from exacting and collecting the tax of four cents per gallon on all gasoline procured by respondent on purchases of gasoline completed outside the State of Wyoming and then brought into said State and used by it in propelling its airplanes in inter-

state commerce is erroneous and in violation of the rules, decisions and principles of law as laid down by this Honorable Court, and that this Honorable Court should require said case to be certified to it for its review and determination under and in accordance with the provisions of the Acts of Congress in such cases made and provided for the following reasons:

1. Because all gasoline procured and purchased by respondent outside the State of Wyoming, prior to its use and consumption by respondent in propelling its airplanes in the transportation of passengers, express, and United States mail in interstate commerce, attains a legal situs within the State of Wyoming for taxation, and the tax is legal and enforceable under the Constitution of the United States and the Constitution and statutes of the State of Wyoming.

2. Because the said tax on all such gasoline, as enforced and collected by petitioners in the State of Wyoming is a uniform, non-discriminatory license tax on all dealers and consumers of gasoline within the State, when it has attained a situs therein subject to the tax laws of the State, and is not a tax on the use of gasoline in interstate commerce.

3. Because the said tax on all such gasoline is not an interference with, or regulation of, interstate commerce among the states, and is not in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States.

4. Because the statutes of the State of Wyoming under attack provide for the exaction and collection of the said tax of four cents per gallon on all gasoline procured by respondent on purchases completed outside the State of Wyoming and used in propelling its airplanes in interstate commerce, and said statutes are valid and legal, and are not in violation of the Constitution of the United States.

E

Brief Accompanying Petition

Your petitioners append hereto their brief in support of this petition, in which each and all of the foregoing matters are more fully set forth and discussed.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 578, Boeing Air Transport, Inc., a corporation, Appellant vs. William H. Edelman, State Treasurer, Harry R. Weston, State Treasurer; The City of Cheyenne, a municipal corporation; and The City of Rock Springs, a municipal corporation, Appellees; and that the said decree, remanding the case with instructions to issue the writ of injunction, of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

WILLIAM H. EDELMAN,
State Treasurer.

HARRY R. WESTON,
State Treasurer.

THE CITY OF CHEYENNE,
A Municipal Corporation.

THE CITY OF ROCK SPRINGS,
A Municipal Corporation.

PETITIONERS.

By JAMES A. GREENWOOD,
Attorney General of the State of Wyoming.

Supreme Court of the United States

October Term, 1932

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

vs.

BOEING AIR TRANSPORT, INC., a Corporation,

Respondent.

Brief in Support of Petition for Writ of Certiorari

I.
The Opinions of the Courts Below

The opinion of the District Court is reported in 51 Fed. (2d) 130, Boeing Air Transport, Inc. vs. Edelman, State Treasurer, et al., and is at page 118 of the Record.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 61 Fed. (2d) 319, Boeing Air Transport, Inc. vs. Edelman, State Treasurer, et al., and is at page 134 of the Record.

II.
Jurisdiction

1. Paragraph (a) of Section 240, Act of February 13, 1925, Chapter 229, 43 Statutes at Large 936 (U. S. Code, Title 28, Section 347 (b)) is as follows:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a Judgment or decree by

such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2. The date of the decree to be reviewed is October 20, 1932 (R. 144). The petition for rehearing was denied November 25, 1932 (R. 147).

3. The parties are citizens of different states and the matter in controversy exceeds in value the jurisdictional amount.

The action is in equity in which respondent, Boeing Air Transport, Inc., a corporation, seeks to permanently enjoin the State Treasurer of the State of Wyoming from collecting an excise tax of four cents per gallon on all gasoline held and owned by it in the State of Wyoming and used as fuel in propelling its airplanes in the business of interstate commerce, no tax having been previously paid thereon, a part of such gasoline having been purchased within the State of Wyoming and a part thereof having been purchased outside the State, but all thereof stored before its use in respondent's storage tanks at the cities of Cheyenne and Rock Springs in said State, and thereafter withdrawn from such tanks and consumed as fuel in propelling respondent's airplanes in the business of interstate commerce.

The tax is collected on or before the 15th of the months following its use.

The ground on which respondent relies for injunctive relief against the collection of the tax is that the statutes of the State of Wyoming, providing for the payment of such tax, are in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, and is an illegal interference with commerce among the states.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit sustains the tax as legal on all such gasoline procured by respondent on purchases within the State of Wyoming and holds the tax to be illegal on all such gasoline procured by respondent on purchases outside the State of Wyoming and then brought into said state and used in propelling its airplanes in interstate commerce.

The decree of the United States Circuit Court of Appeals for the Tenth Circuit remands the cause to the Lower Court, with directions to issue the writ of injunction prayed for, enjoining collection of the tax of four cents per gallon on all gas-

oline procured by respondent on purchases completed outside the State of Wyoming and then brought into said State and used in its airplanes in propelling them in interstate commerce.

4. The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Bradford Electric Light Co. v. Clapper, 284 U. S. 221;
Public Service Commission, et al. v. Batesville Telephone Co., 284 U. S. 6;
Smith v. Wilson, 273 U. S. 388, 391;
Magnum Import Co., Inc. v. Coty, 262 U. S. 159.

III.
Statement of the Case

Statement of the case and of the matters involved are sufficiently set forth under A and C in the Petition, in connection with the foregoing subdivision 3, therefore, for the sake of brevity these statements are not repeated at this point.

IV.
Specification of Error

The United States Circuit Court of Appeals for the Tenth Circuit erred in its decree in finding and holding therein and to the extent that it remanded said cause to the District Court with directions to issue the writ of injunction enjoining petitioners from exacting and collecting the tax of four cents per gallon on all gasoline procured by respondent on purchases of gasoline completed outside the State of Wyoming and then brought into said State and used by it in propelling its airplanes in interstate commerce for the following reasons:

(a) Because all gasoline procured and purchased by respondent outside the State of Wyoming, and used in propelling its airplanes in the transportation of passengers, express, and United States mail in interstate commerce, before its use and consumption was stored by respondent in its tanks within the State of Wyoming, and thus had attained a legal situs within the State of Wyoming for taxation, and the tax is legal and

enforceable under the Constitution of the United States and the Constitution and statutes of the State of Wyoming.

(b) Because the said tax on all such gasoline, as enforced and collected by petitioners in the State of Wyoming is a uniform, non-discriminatory license tax on all dealers and consumers of gasoline within the State, when it has attained a situs therein subject to the tax laws of the State, and is not a tax on the use of gasoline in interstate commerce.

(c) Because the said tax on all such gasoline is not an interference with, or regulation of, interstate commerce among the states, and is not in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States.

(d) Because the statutes of the State of Wyoming provide for the exaction and collection of the said tax of four cents per gallon on all gasoline procured by respondent on purchases completed outside the State of Wyoming and used in propelling its airplanes in interstate commerce, and said statutes are valid and legal, and are not in violation of the Constitution of the United States.

V

Argument

A

THE STATUTES OF WYOMING LEVY A LICENSE TAX OF FOUR CENTS PER GALLON ON ALL GASOLINE USED OR SOLD FOR DOMESTIC CONSUMPTION, AFTER ITS STORAGE IN THE STATE, AND DO NOT TAX THE USE OF GASOLINE AS A MEANS BY WHICH INTERSTATE COMMERCE IS EFFECTED.

The statutes of the State of Wyoming under which the petitioner, State Treasurer, is collecting and enforcing the tax of four cents per gallon on the gasoline of respondent, are found in Article 11 of Chapter 115, Wyoming Revised Statutes, 1931, page 1862, and are set forth in full as an appendix to this brief.

We direct particular attention to the following provisions thereof:

> "115-1102. Amount of tax. A license tax of four cents per gallon is hereby levied on all gasoline used or sold in this state for domestic consumption to be collected as hereinafter set forth."

> "115-1103. Payment of tax. * * * Every person, firm or corporation, who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this state, shall, on or before the 15th day of each calendar month, render a true statement to the state treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; * * *"

The statute of 1923 taxed gasoline sold for domestic consumption. The word "used" was added in 1925 and the two words, "used" and "sold", have uniformly appeared thereafter.

As there has been no attempt to construe the statute as permitting the taxing of gasoline placed in appellant's planes in an adjoining state and used or consumed while passing through Wyoming, but solely as permitting the taxation of gasoline stored by appellant in its tanks and thereafter placed in its planes within the state, under well established principles of construction followed by this Court, this construction will be adopted and followed.

As no attempt is being made by the taxing authorities to tax gasoline placed in planes or vehicles of transportation without the state, it may be assumed that the word "used" was added to the statute for the purpose of making it uniform and to prevent its evasion rather than for the purpose of adding new sources of revenue. No doubt, the intention of the legislators of 1923 was to levy a tax on all gasoline which had attained a fixed situs within the state for the purpose of domestic consumption, by levying the same on all gasoline sold therein, but knowing the possibility of its evasion as well as desiring to place all domestic consumers on an absolutely equal basis, the word "used" was added by the succeeding legislature, and is to be construed as synonomous with sale.

We thus are dealing with a statute, as interpreted and construed, which levies a tax of four cents per gallon on all gasoline, which has acquired a fixed situs within the State of Wyoming and is thereafter and within the State sold to a domestic consumer or placed by a domestic consumer in his machine for use therein. A single tax on all gasoline for domestic consumption, whether sold or used, not a tax on the sale and another on the use.

B

INSTRUMENTALITIES USED IN INTERSTATE COMMERCE, UNDER THE DECISIONS OF THIS COURT, ARE SUBJECT TO EITHER A PROPERTY, OR LICENSE TAX BY A STATE, THE SAME AS OTHER PROPERTY, ALL HAVING A SITUS THEREIN.

"It has been again and again said by this court that while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce." Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 445.

"While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce." Helson v. Commonwealth of Kentucky, 279 U. S. 245, 249.

"The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. Gregg Dyeing Co. v. Query, Supreme Court of South Carolina, decided April 13, 1931, S. C. , 164 S. E. 588. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce. 'It is elementary,' said the Court in New Jersey Bell Teleph. Co. v. State Bd. of Taxes & Assessments, 280 U. S. 338, 346, 74 L. Ed. 463, 467, 50 S. Ct. 111, 'that a State may tax property used to carry on interstate commerce.' Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions. Superior Oil Co. v. Mississippi, 280 U. S. 390, 395, 74 L. Ed. 504, 507, 50 S. Ct. 169. Undoubtedly, purchases of goods within a State may form part of transactions in interstate com-

merce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected." Eastern Air Transport, Inc. v. South Carolina Tax Commission, et al., 285 U. S. 147, 152, 153.

C

PROPERTY ACQUIRED BY PURCHASE IN ANOTHER STATE THAN THAT IN WHICH IT IS USED, WHENEVER IT BECOMES A PART OF THE GENERAL MASS OF THE PROPERTY OF THE STATE OF ITS USE, BY DELIVERY AND STORAGE THEREIN, BECOMES SUBJECT TO THE TAXATION LAWS OF THE STATE OF ITS USE AND SITUS, REGARDLESS OF THE CLASS OF THE TAX OR THE USE THEREAFTER OF THE PROPERTY.

The tax was sustained by the Circuit Court of Appeals on all gasoline of respondent procured by it on purchases within the State.

Gasoline of respondent procured on purchases outside the State, having thereafter been stored by it in its storage tanks within the State, was thereafter withdrawn, as and when needed, placed in its airplanes, and used and consumed in propelling its airplanes in interstate commerce. We think a license tax on all such gasoline is equally not open to attack as an interference with commerce among the states.

We can conceive of no difference between the two, so far as respondent's objection thereto is concerned. Neither is a tax

on the use of gasoline in interstate commerce, nor a tax "exacted as the price of the privilege of using an instrumentality of interstate commerce."

Whenever the subjects of interstate commerce cease longer to be in transportation between the states, that is, as repeatedly said by this Court, "come to rest" within a state, the subjects of such commerce then become a part of the mass of the property of that state, subject to its laws, and attain a situs, subject to taxation within that state.

> "That with respect to such substances when they have passed out of interstate commerce and have come to rest within the state and become a part of the general mass of property or have become the subject of domestic commerce, the state may impose inspection fees substantially in excess of the cost of inspection, and thus make them a source of general revenue, is also free from doubt, other than any which may arise from its own constitution." Texas Co. v. Brown, 258 U. S. 466, 475, 66 L. Ed. 721.
>
> "Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original package or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject." Sonneborn Brothers v. Keeling, et al., 262 U. S. 506, 508, 509, 67 L. Ed. 1095.
>
> "Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the federal Constitution is concerned, be exerted in any way which the state's constitution and laws permit, provided, of course, it does not discriminate against the commodity because of its origin in another state." Hart Refineries v. Harmon, 278 U. S. 499, 501, 502, 73 L. Ed. 475.

As controlling and upholding the legality of the tax, we cite Gregg Dyeing Co. v. Query, et al., 286 U. S. 472 (Preliminary Print No. 3), 76 L. Ed. 852, opinion by Mr. Chief Justice Hughes, and affirming the opinion of the Supreme Court of S. C. as reported in 164 S. E. 588. At pages 478 and 479 it is said:

> "We may lay aside, as not here involved, any question relating to importations from foreign countries. As to interstate commerce, the questions are (1) whether the Act as applied by the state court imposes a direct burden upon that commerce, and (2) whether, although the subject of the tax would otherwise be within the power of the State, the tax is invalid because it creates an unconstitutional discrimination against transactions in interstate commerce.
>
> "As to the first question, we are not concerned with what the tax is called but with what the statute does. It imposes an exaction with respect to gasoline purchased in other States and brought into South Carolina and there placed by appellants in storage for future use within the State. By the terms of the Act, as construed by the state court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority 'to tax the products or their storage or sale.' Texas Company v. Brown, 258 U. S. 466, 478; Sonneborn Bros. v. Cureton, 262 U. S. 506, 519, 520; Hart Refineries v. Harmon, 278 U. S. 499, 501, 502. Not only may local sales of gasoline thus brought into the State be taxed, but its use as well. This was specifically determined in Bowman v. Continental Oil Co., 256 U. S. 642, 648, 649. See Hart Refineries v. Harmon, supra; Breece Lumber Co. v. Asplund, 283 U. S. 788. There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation. Helson v. Kentucky, 279 U. S. 245, 252; Eastern Air Transport v. South Carolina Tax Comm., 285 U. S. 147. In view of these well-established principles, we find no ground for concluding that the State could not impose the tax with respect to the gasoline of appellants which was kept with-

> in the State for use in their local enterprises. As the Court said, in Hart Refineries v. Harmon, supra, interstate transportation having ended, the taxing power of the state in respect to the commodity may, so far as the commerce clause of the Federal Constitution is concerned, 'be exerted in any way which the State's constitution and laws permit'. This, of course, is on the assumption that the tax does not discriminate against the commodity because of its origin in another State."

Bearing on the legality of the tax, the only difference between the two statutes, as construed, is that the South Carolina statute "does not propose to tax any gasoline until twenty-four hours after it has lost its interstate character."

That the length of time the property has been stored, or has been "at rest", within the state is not the controlling feature, we quote from an importation case, as in point on the question of the length of time the property must be "at rest" before it is subject to the taxing power of the state.

> "Without further reference to authorities we state our conclusion to be that within the decision in Brown v. Maryland the boxes, cases or bales in which plaintiffs' goods were shipped were the original packages, and the goods imported by them lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that state, the moment the boxes, cases or bales in which they were shipped reached their destination for use or trade and were opened and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States." May v. New Orleans, 178 U. S. 496, 509, 510, 44 L. Ed. 1165.

In Foster & Creighton Co. v. Graham, et al., 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 971, a tax on gasoline received in interstate commerce and stored and used was sustained, although the statute contains no provision fixing any definite length of time for loss of its interstate character.

In Burke v. Bass, et al., 242 N. W. 606, decided by the Supreme Court of Nebraska May 20, 1932, a tax on gasoline was sustained, under the same conditions as in the Tennessee case.

In Breece Lumber Co., et at. v. Mirabal, 34 N. M. 643, 287 Pac. 699, a tax on gasoline was sustained, under the same conditions as in the Tennessee and Nebraska cases. After the substitution of Asplund as defendant, as reported in 283 U. S. 788, the decree of the state court was affirmed without opinion.

> "It is not the intent with which the gasoline is to be used that determines the liability of the taxes, but it is the status of the gasoline at the time." American Airways, Inc. v. Wallace, et al., 57 Fed. (2d) 877, 880.
>
> See, also, Brown v. Houston, 114 U. S. 622, 632-634; American Steel & Wire Co. v. Speed, 192 U. S. 500, 520; Bowman v. Continental Oil Co., 256 U. S. 642, 648-649; Jerome H. Sheip Co. v. Amos, 130 So. 699 (Fla.).

While in the Helson case, supra, the tax, levied by the State of Kentucky on gasoline purchased in Illinois, was declared illegal, the gasoline never at any time came to rest in Kentucky and never became part of the mass of the property of that state. Obviously that case is distinguishable from the instant case, both, on principle, and, as clearly shown by the Gregg Dyeing Co. case, supra, and other cases cited herein.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the State of Wyoming may proceed with the enforcement of its statutes and the collection of the license tax on gasoline, as provided therein, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit.

Respectfully submitted,

JAMES A. GREENWOOD,
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Appendix

Chapter 115, Article 11, Wyoming Revised Statutes, 1931, page 1862.

GASOLINE TAX

115-1101. Definitions. The words and phrases used in this article shall be construed for the purpose thereof as follows:

(1) "Wholesaler" is hereby defined as any person, firm or corporation who imports or causes to be imported gasoline, as herein defined, for sale in the state of Wyoming to the jobber or consumer, or to the persons, firms, corporations or associations of persons, who, in turn, sell to the jobber or consumer; the term "wholesaler" is further defined to mean any person, firm or corporation who produces, refines, manufactures, blends or compounds gasoline in the state of Wyoming for use, sale or distribution in this state;

(2) "Gasoline" is hereby defined as the volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of gasoline, and such other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles, except the product commonly known as kerosene. [L. '23, c. 73, § 1.

115-1102 Amount of tax. A license tax of four cents per gallon is hereby levied on all gasoline used or sold in this state for domestic consumption to be collected as hereinafter set forth. [L. '29, c. 139, §1, amending L. '27, c. 70, §1; L. '25, c. 89, §1; L. '23, c. 73, §2.

115-1103. Payment of tax. Each and every wholesaler as defined in this article, who is now or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this state in the sale or use of gasoline as herein defined shall not later than the fifteenth of each month, render to the state treasurer a statement of all gasoline sold or used by them in the state of Wyoming during the preceding calendar month, and pay to the state treasurer at the same time, the license tax of four cents per gallon on all such gasoline. Said statement to the state treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner, or managing agent, in the case of an individ-

ual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers, in the case of a domestic corporation. Every person, firm or corporation, who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this state, shall, on or before the 15th day of each calendar month, render a true statement to the state treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; provided, that before making the distribution of funds provided for in § 115-1108, the state treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal or county air field to the city, town or county where such air field is located, to be used for the maintenance and improvement of such air field. [L. '31, c. 23, § 1, amending L. '29, Spec. Sess., c. 14, § 1; L. '23, c. 73, § 3.

115-1104. Penalty for violation. Any party violating any of the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be subject to a fine of not less than fifty dollars and not more than two hundred dollars, or to imprisonment for one month, or to both such fine and imprisonment. [L '29, Spec. Sess., c. 14, § 2.

115-1105. Report to state treasurer. Every person, firm, corporation, association, co-partnership or common carrier, transporting, conveying or bringing gasoline into the state of Wyoming, for retail or wholesale consumption or distribution within the state of Wyoming, shall furnish to the state treasurer of the state of Wyoming, upon a form to be provided by the treasurer, not later than the 10th day of each calendar month, a verified statement showing the gallons of gasoline delivered into the state of Wyoming during the month preceding such report, giving the name of the person, firm, corporation, association or co-partnership to whom the same was delivered and the place of delivery. [L. '29, c. 89, § 1.

115-1106. Penalty for failure to report. Failure to furnish such reports to the state treasurer of the state of Wyoming as provided by this article within twenty days after the date when same is due shall be deemed a misdemeanor and

upon conviction, be punishable by a fine of not less than $25.00 nor more than $100.00 for each separate offense. [L. '29, c. 89, § 3.

115-1107. Record of gasoline brought into state. Every wholesaler in gasoline and every person, firm, corporation, co-partnership, or common carrier transporting, conveying or bringing gasoline into the state of Wyoming for retail or wholesale consumption or distribution within the state of Wyoming, as in this article defined shall keep a record of all purchases, receipts, sales and distribution of gasoline; such records shall at all times be subject to inspection by the state treasurer or his deputies or such other officers duly authorized by the state treasurer. [L. '29, c. 89, § 2, amending L. '23, c. 73, § 4.

115-1108. Distribution of receipts from tax. Seventy-five per centum of all funds received by the state treasurer from the gasoline license tax provided for in this article, shall be placed to the credit of the state highway fund and shall be used: first, for the payment of interest upon any hereafter issued state highway bonds as such interest may become due; and, second, for maintenance, improvement and asphalt oil surfacing for state highways; provided, that funds for the said second purpose of maintenance, improvement and asphalt oil surfacing for state highways, shall be apportioned between the several counties of the state in proportion to the number of miles of designated state highways therein. The remaining twenty-five per centum shall be apportioned by the state treasurer between the several counties of the state, thirty per centum in the ratio which the area of the county bears to the total area of the state, excepting areas included in national parks; thirty per centum in the ratio which the rural population of the county bears to the total rural population of the state according to the last available state or federal census, and forty per centum in the ratio which the assessed valuation of the county bears to the last total assessed valuation of the state, and on July 15th, and quarterly thereafter he shall pay same to the respective county treasurers who shall credit the same to the county road fund; provided, that seventy-five per centum of all refunds or other expenses paid by the state treasurer according to law, shall be charged to the state highway fund, and twenty-five per centum to the fund to be appor-

tioned among the counties. [L. '31, c. 73, § 167, amending L. '29, Spec. Sess., c. 11, § 1; L. '23, c. 73, § 5.

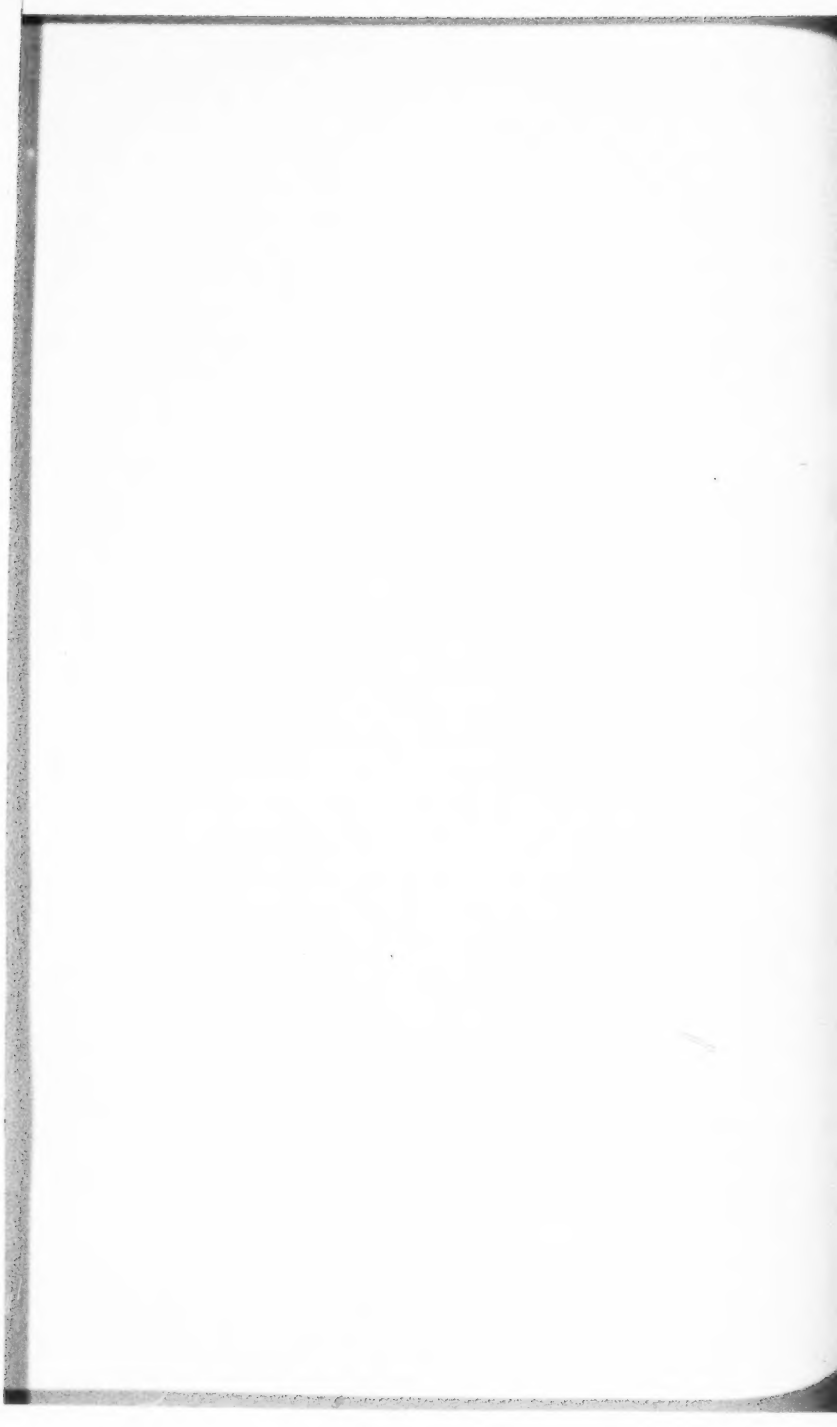
115-1109. Display of sign. Every person, firm or corporation, who shall have in his possession, for the purpose of sale, or who shall sell or offer for sale to the retail trade, gasoline for use in motor vehicles, shall display in a conspicuous place a sign stating the price at which said gasoline should be sold and the amount of tax thereon. And any person, firm or corporation who shall neglect to so give the notice provided for in this article, or who shall violate any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25.00), nor more than one hundred dollars ($100.00), or by imprisonment in a county jail for not less than ten days nor more than thirty days, or by both such fine and imprisonment. [L. '27, c. 70, § 4, amending L. '25, c. 89, § 4.

115-1110. Violation—Penalty. It shall be unlawful for any such wholesaler, as herein defined, of gasoline, or other products subject to said tax, to sell or offer the same for sale in the state of Wyoming while delinquent in the payment of the whole or any part of the tax due and payable hereunder, and any such wholesaler who fails or refuses to pay the tax hereinbefore provided for at the time the same becomes due, shall be liable for double the amount thereof to be recovered in a suit instituted by and in the name of the state of Wyoming in any court of competent jurisdiction, in which suit, upon application made by the state of Wyoming, a writ of injunction may be issued against the defendant or defendants without requiring any bond, enjoining and restraining them from selling or attempting to sell or offer for sale in the state of Wyoming any gasoline or other products subject to said tax, while the whole or any part of the tax due from such defendant remains unpaid, and in such suit the court may, upon application made by the state of Wyoming, appoint a receiver of the property and business of the defendant, for the purpose of impounding the same as security for the payment of said delinquent tax and any judgment recovered in said suit. The state treasurer, or his assistant or deputies, shall have the right, during business hours to inspect the books and records of any party subject to said tax, for the purpose of determining the amount of tax due and payable and whether the same has been paid. Any party

violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be subject to a fine of not less than fifty dollars ($50.00) and not more than two hundred dollars ($200.00) or to imprisonment for one month, or to both such fine and imprisonment. The remedies herein provided shall be cumulative. [L. '29, c. 139, § 4, amending L. '23, c. 73, § 6.

115-1111. Exception. Said gasoline license tax shall not be imposed on gasoline when exported or sold for exportation from the state of Wyoming to any other state or nation. [L. '23, c. 73, § 8.

115-1112. Prosecution. Upon request of the state treasurer, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction, any and all necessary action or actions at law, to enforce the provisions of this article. [L. '23, c. 73, § 9.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 571

WILLIAM H. EDELMAN, State Treasurer;
HARRY R. WESTON, State Treasurer;
THE CITY OF CHEYENNE, ET AL.,
Petitioners
vs.
BOEING AIR TRANSPORT, INC.

Supplement to Brief in Support of Petition

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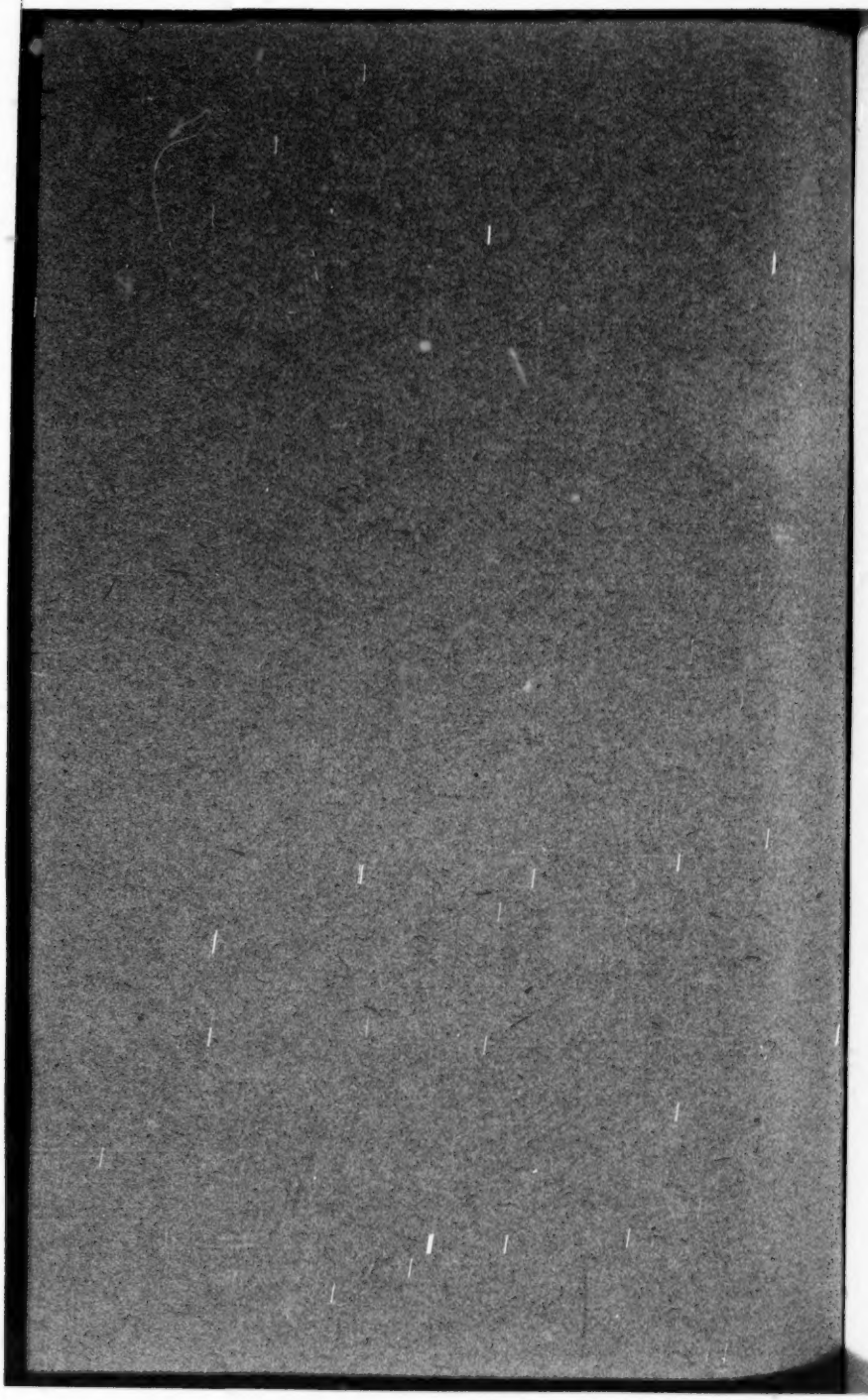

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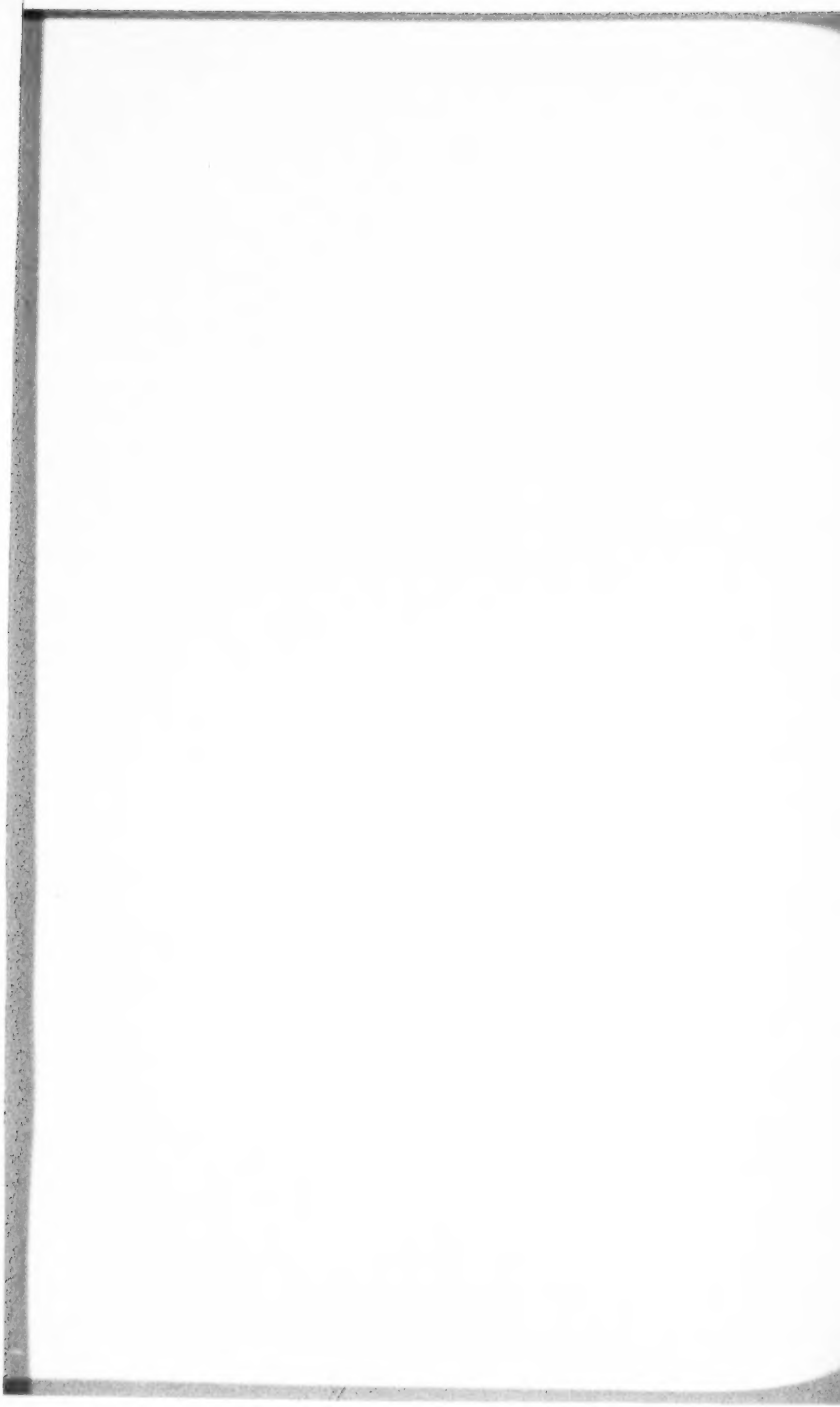

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Correction

There is an error in the printed decision of the Circuit Court of Appeals, quoted in the petition for writ of certiorari. In line 17, page 4, following "without", there should be inserted, "protest, but". The sentence should read, "Appellant paid the tax on the gasoline used by it locally and on that sold to others without protest, but protested payments on all put in its tanks and used in interstate flights". (R. 140)

Argument

Opinion of the District Court is at page 119 of the Record.

Opinion of the Circuit Court of Appeals is at page 132 of the Record.

Decree of the Circuit Court of Appeals is at page 142 of the Record.

We think that the decision of this Court announced February 6, 1933, in No. 176, The Nashville, Chattanooga & St. Louis Railway v. Roy C. Wallace, Comptroller, et al., establishes the correctness of propositions B and C of the Argument of petitioners' brief in support of the petition, and the legality of an excise tax on gasoline consumed in interstate commerce, under the facts disclosed by the Record in the case at bar. Indeed, although not controlling, there is one stronger

fact in the instant case. Respondent sold a portion of the gasoline stored in its tanks and from which it withdrew the gasoline on which it is seeking to enjoin the collection of the tax and contracted with the City of Rock Springs for the right of such sale.

Proposition "A" of petitioners' brief is as follows:

"THE STATUTES OF WYOMING LEVY A LICENSE TAX OF FOUR CENTS PER GALLON ON ALL GASOLINE USED OR SOLD FOR DOMESTIC CONSUMPTION, AFTER ITS STORAGE IN THE STATE, AND DO NOT TAX THE USE OF GASOLINE AS A MEANS BY WHICH INTERSTATE COMMERCE IS EFFECTED."

The Wyoming statutes are given in full as an appendix to brief of petitioners in support of their petition, beginning at page 19.

The Circuit Court of Appeals said, "We think it plain that the original act and as amended imposes the tax only against wholesalers as that term is defined in the original act". (R. 135)

That the Wyoming gasoline tax primarily is intended to be collected from and paid by the wholesaler, as defined in the law, we think is true.

Chapter 14 of the Special Session of 1929 amended Section 2 of Chapter 139, Session Laws of 1929 (Section 115-1103, W. R. S., 1931), by adding at the end thereof the following:

> "Every person, firm or corporation, who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this state, shall, on or before the 15th day of each calendar month, render a true statement to the state treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; provided, that before making the distribution of funds provided for in Section 115-1108, the state treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal or county air field to the city, town or county where such air field is located, to be used for the maintenance and improvement of such air field."

Thus this amendment provides for three distinct things:

(1) Levies the tax on "Every person, firm or corporation", coming under its provisions, and not defined as a "wholesaler";

(2) Provides for the payment of the tax; and,

(3) Provides that the tax on "all gasoline used at any municipal * * * air field" shall be paid over to the city where located "for the maintenance and improvement of such air field".

The only other difference between the Wallace case and the case at bar is as to the wording of the state statutes. The Tennessee statute imposes the tax on "storing any of the products mentioned in this act, and distributing the same, or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use". By the amendment the Wyoming law levies the tax "on gasoline used at any municipal or county air field", and by the preceding Section "on all gasoline used or sold in this state for domestic consumption".

In the Wallace case it was decided that a tax on gasoline purchased outside the state of Tennessee and stored within the state, withdrawn and used in generating motive power in interstate commerce, was a valid tax, under the statute of that state.

Therefore the only question in the case at bar is, Is the tax valid under a statute levying the same "on all gasoline used * * * in this state for domestic consumption", as provided in Section 115-1102, and as provided in the following Section, as amended, "on gasoline used at any municipal * * * air field"?

We understand that it is the taxation of the use of gasoline in the sense of its consumption as a fuel that is forbidden in the Helson case, for, referring thereto, it is said in the Wallace case that the tax forbidden therein was "levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce".

The word "used" admits of different meanings, such as sold, consumed in generating motive power, and stored and withdrawn.

"A sale is one of the uses to which property can be subjected. As relating to one's possession, the word 'use' includes every purpose for which such property may be used", Gulf Refining Co. v. Smith, et al., 164 Ga. 811, 814, 139 S. E. 716, 718.

Gasoline used in the state for domestic consumption, used at an air field, or used for domestic consumption at an air field, is not gasoline used in generating motive power. Since the law qualifies use for domestic consumption, this is the use that is the basis of the tax, and not that of generating motive power in interstate commerce.

Respondent stores and withdraws the gasoline on which petitioners collect the tax. Respondent uses the gasoline at the municipal air field, that is, it stores and withdraws the gasoline at the air field. Petitioners are not taxing the use of gasoline in generating motive power, after it is withdrawn from respondent's storage tanks. If they were, they would tax all gasoline so used from the time respondent's airplanes crossed the state line, as was attempted in the Helson case.

However, we do not think that the mere wording of the statute is controlling, for it has been repeatedly held by this Court, in passing on the legality of a tax, that it regards the substance and not the form.

"In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State." Gregg Dyeing Co. v. Query, 286 U. S. 472, 476. And at page 478 it is said, "As to the first question (imposing a direct burden upon interstate commerce), we are not concerned with what the tax is called, but with what the statute does."

"The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents;" Dawson v. Kentucky Distilleries, 255 U. S. 288, 292.

"On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed,

they are not open to attack' as restraining or burdening such commerce." Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453.

"And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized." Kansas City Ry. v. Kansas, 240 U. S. 227, 231.

"The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such." U. S. Express Co. v. Minnesota, 223 U. S. 335, 344.

"Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." Galveston, Harrisbury etc. Ry. Co. v. Texas, 210 U. S. 217, 227.

"Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy." Nicol v. Ames, 173 U. S. 509, 516.

The most unfavorable view that can be taken of the Wyoming law is that it provides for the payment of a non-discriminatory license tax of four cents per gallon on all gasoline which has become a part of the general mass of the property of the State. Without ourselves presuming to define an excise tax, it has been frequently referred to by this Court as an indirect tax. We think that one of its characteristics is that only those are required to pay it who voluntarily acquire or use the article on which it is levied. That is, it is a tax levied on certain articles, such as tobacco, intoxicating liquors and gasoline. As was said by this Court in Patton v. Brady, Executrix, 184 U. S. 608, 618-619:

"It is true other counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax* cases, but, as we have seen, it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and intended use."

The District Judge sustained the tax as compensation to the cities for the facilities furnished and their outlay in maintenance and upkeep of the air fields. We do not deem it necessary to cite additional authorities to those relied on by him. He having found the compensation reasonable, we think this finding will be accepted by this Court. (R. 126-131)

Conclusion

It is uniformly held that the user of the article pays the excise tax. In enforcing the payment of the gasoline tax by respondent, petitioners are collecting a uniform, non-discriminatory tax on all users of gasoline in the State, and on which no tax has been paid. To declare the tax invalid, as administered against respondent, is to place respondent in a preferred class as a user of gasoline in generating motive power in interstate commerce.

We respectfully submit that the decree of the United States Circuit Court of Appeals for the Tenth Circuit, remanding this cause with instructions to issue the injunction, should be reversed, with directions to affirm in all respects the decree of dismissal rendered by the United States District Court for the District of Wyoming.

Respectfully submitted,

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